Filed 11/22/16 In re A.S. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re A.S., a Person Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JUSTIN G., Defendant and Appellant.	B269271 (Los Angeles County Super. Ct. No. DK05621)

APPEAL from orders of the Superior Court of Los Angeles County, Natalie Stone, Judge. Affirmed.

Elizabeth Klippi, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Justin G. (Father) appeals the juvenile court's jurisdictional and dispositional orders. He contends substantial evidence does not support the court's finding that his young son A. was at risk of harm as a result of Father's use of marijuana and his instigation of an incident of domestic violence involving the boy's mother, Alexis S. (Mother). Father further contends the court erred in "removing" A. from him because he was not the custodial parent. We find substantial evidence to support the court's jurisdictional findings. To the extent the court's dispositional order can be read as ordering A. removed from Father's custody, any error was harmless. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Prior Proceedings*

In March 2014, two months after A.'s birth, a non-detain petition was filed, based on allegations that Mother

used drugs while pregnant. Three months later, the court dismissed the petition for lack of evidence.[1]

A second petition was filed in September 2014. This petition alleged -- and the court ultimately found true -- that in August 2014, Mother and Father engaged in a violent altercation in which Mother scratched, struck and pushed Father, Father pushed Mother, and Mother was arrested. In January 2015, the court returned A. to Mother, directed that she complete a parenting class, participate in drug testing and a 12-step program, and attend conjoint counseling with Father. Father was found nonoffending, but ordered to submit to 10 random drug tests, and to participate in a treatment program if any tests were missed or positive. Father tested negative twice, but missed three tests and thereafter declined to attend a treatment program. Based on Mother's compliance, the court terminated jurisdiction in July 2015. The July 9 exit order granted Mother custody and Father weekend visitation.

B. *Underlying Petition*

On July 11, 2015, just days after issuance of the exit order in the prior proceeding, the Department of Children

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[1] Mother was herself a minor when A. was born. She had been declared a dependent in 2002 based on domestic violence and physical abuse by her stepfather, and in 2013 based on her own substance abuse and the maternal grandmother's failure to obtain treatment for her.

and Family Services (DCFS) received a referral that the maternal grandmother, Heidi S., was permitting an older man, alleged to be an active gang member, to live in her home and have a sexual relationship with Mother.[2] It was further reported that Mother was again using methamphetamine, and that parties were being held in the home where the guests smoked methamphetamine and marijuana while children were present. Father was incarcerated at the time.

Mother and Heidi were interviewed and denied that the alleged gang member was living with them or that drugs were being used in the home. Mother agreed to drug test. However, throughout the months of July, August and September, she either ignored calls from the caseworker, or promised to test on specific dates but failed to appear after the caseworker made the arrangements. In addition, Mother missed multiple scheduled appointments with the caseworker. Mother finally drug tested on September 15, 2015. The results were positive for methamphetamine and amphetamine.

After Mother's positive test, the caseworker interviewed paternal family members and learned the reason for Father's incarceration. He had been convicted of a charge of domestic violence as a result of an incident that occurred in December 2014, during the pendency of the prior

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[2] Mother was not quite 18 at the time.

proceeding, that was never reported to DCFS. A police report indicated that Father had punched Mother in the mouth and hit her with a 14-inch barbeque spatula. He had also hit a maternal uncle who tried to come between them. A. was not present when the violence erupted, but Mother was babysitting her one-year old niece. The officers observed cuts and swelling on Mother's face. Because the spatula had a six-inch blade, the officers arrested appellant for assault with a deadly weapon.[3] Mother obtained a protective order, and Father pled nolo contendere to a charge of domestic violence. Shortly before the detention, Father was arrested for failing to attend a scheduled court date related to the offense.

Paternal relatives said Father had begun using methamphetamine regularly after getting together with Mother in 2011. They said there had been "multiple" domestic violence disputes between Mother and Father due to Mother's "severe anger management issues," including an altercation that occurred in September 2015. They believed Father was currently clean and not associating with Mother, but said that Mother continued to use methamphetamine despite having become pregnant a second time.[4] Not long

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[3] Appellant was charged with battery under Penal Code section 242; that charge was dismissed in the plea agreement, described above.

[4] Mother later reported that Father was the father of her unborn child.

before, Mother's sister had asked Father to come get A., because Mother was "'back on dope.'"

On September 28, 2015, DCFS detained A. from Mother, and Mother checked herself into an inpatient drug treatment program. A petition under Welfare and Institutions Code section 300 was filed, alleging that both Mother and Father had a history of illicit drug use, including methamphetamine use.[5] Prior to the detention hearing, Father was released from incarceration. DCFS filed a last-minute information to the court, stating that it opposed A.'s release to Father in light of the December 2014 domestic violence incident that had come to light, and Father's failure to comply with drug testing or drug treatment in the prior proceeding. At the October 1, 2015 hearing, Father requested custody, informing the court that he had been having unmonitored visits with A. since the earlier proceeding terminated. Counsel for DCFS, counsel for A., and counsel for Mother objected to the request. The court denied Father's request, and found a prima facie case for detaining A., observing that the evidence supported a prima facie case that Father was a user of methamphetamine, and that he had yet to obtain treatment following his arrest and prosecution for the December 2014 domestic violence

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[5] Undesignated statutory references are to the Welfare and Institutions Code.

incident.[6] The court ordered Father's visits monitored until he had two clean drug tests, at which time DCFS would have discretion to liberalize visitation.[7]

In November 2015, DCFS filed an amended petition, adding allegations of domestic violence based on the December 2014 incident. Interviewed prior to the jurisdictional hearing, Mother admitted using marijuana and methamphetamine regularly, beginning in her early teenage years. She said Father smoked marijuana "often" and used methamphetamine "once in a blue moon." Father admitting hitting Mother "once" in the December 2014 altercation, claiming she'd hit him first and that he was "only defend[ing] himself." He said he held a medical marijuana card based on a diagnosis of "anxiety," which he described as "just an excuse." He initially stated he did not smoke marijuana, but then corrected himself, saying he was "not going to use it anymore." Father said he knew the conditions in Mother's home were bad prior to the detention,

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[6] The court stated that it found "a prima facie case for detaining [A.] from both Mother and Father . . . ." The minute order reflected the court found "[a] prima facie case for detaining the minor[]," and that "[s]ubstantial danger exists to the physical or emotional health of [the] minor[,] and there is no reasonable means to protect the minor[] without removal."

[7] Father provided a diluted specimen for an October 2, 2015 test. He missed tests on October 6 and 21.

which is why he "fought for getting weekends with [A.] . . . ." He intended to move in with his father and obtain a GED after his release. He denied any intent to reunify with Mother despite her representation that the child she was carrying was his.[8]

C. *Hearing*

At the November 17, 2015 jurisdictional hearing, counsel for Father, who was still incarcerated, asked the court to dismiss the allegations pertaining to him.[9] Counsel argued that the domestic violence incident was too far in the past to support a current risk, that there was no substantial evidence of recent drug use, and that to the extent any

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[8] Father was arrested in November 2015, and provided a telephonic interview later that month. He claimed to have been arrested because he could not afford to enroll in the domestic violence program required by the criminal court. The record reflects that he was ordered to appear in court on October 15 "to be given re-enrollment papers for the domestic violence program," that he failed to appear, and that he was in custody on October 27 "on another matter." Prior to his re-incarceration, the caseworker had provided Father referrals for domestic violence and drug treatment programs.

[9] Mother acceded to jurisdiction based on allegations that she was a recent user of marijuana, amphetamine and methamphetamine, and had been under the influence when A. was in her care.

evidence supported recent marijuana use, Father had a medical marijuana card.

Counsel for DCFS argued that substantial evidence supported a finding that Father and Mother engaged in violent domestic altercations on more than one occasion, and that Father was a user of marijuana. Counsel noted that Father had never addressed his propensity for domestic violence, as he had never enrolled in the counseling ordered by the criminal court. Counsel for A. contended that Father posed a risk to his son until he participated in a program designed to give him tools to control his anger, observing that the December 2014 assault on Mother involved extreme violence.[10]

The court struck the allegation that Father had a history of using methamphetamine, but found he had a history of using marijuana. The court also found true that Mother and Father engaged in a violent altercation in which Father "punched [Mother] in the mouth," "hit [her] on the forehead with a barbeque spatula," and "punched the maternal uncle who attempted to protect [Mother] . . . ."[11] The court found no evidence that the couple's propensity for domestic violence had been resolved, and further stated:

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[10] Counsel for A. took no position on the drug allegation.

[11] The court found jurisdiction warranted under section 300, subdivision (b) (failure to protect), but struck an allegation that the domestic violence incident posed a risk of serious physical harm to A. under subdivision (a).

"just because Father says he has no interest in getting back with Mother doesn't give me a hundred percent certainty that they're not going to be around each other engaging in continuing violence . . . ."

When the court turned to disposition, counsel for A. asked that the court consider placing the boy, who had been in foster care since the detention, with paternal relatives. No other party asked to be heard on placement. Father's counsel requested that the twelve random drug tests DCFS recommended for Father's case plan be reduced to six. The court ordered A. "removed from [Mother] and [Father]," and ordered Father to submit to six drug tests.[12] If any were missed or dirty, he was to participate in a full substance abuse treatment program. The court also instructed Father to participate in a 52-week domestic violence program, a parenting class and counseling.[13] This appeal followed.

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[12] The minute order stated the court found by "clear and convincing evidence pursuant to [§] 361(c)" that "[s]ubstantial danger exists to the physical health of minor[] and/or minor[] is suffering severe emotional damage, and there is no reasonable means to protect without removal from parent's or guardian's physical custody," and that "[r]easonable efforts have been made to prevent or eliminate the need for removal of the minor from the home of parents(s)/legal guardian(s)."

[13] Mother's reunification plan also included drug testing and programs. Mother is not a party to this appeal.

DISCUSSION

A. *Jurisdiction*[14]

In order to assert jurisdiction over a minor, the juvenile court must find that the child falls within one or more of the categories specified in section 300. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.) DCFS bears the burden of proving that the minor comes under the juvenile court's jurisdiction. (*Id.* at p. 185.) The finding that

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[14] Respondent contends we need not address the issues raised by Father because the juvenile court's assertion of jurisdiction would be supported by the finding sustained as to Mother's substance abuse, which neither party challenges. (See *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [when dependency petition alleges multiple grounds for assertion that minor comes within dependency court's jurisdiction, reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the enumerated bases for jurisdiction is supported by substantial evidence].) Appellate courts generally exercise discretion to reach the merits of a challenge to a jurisdictional finding where it "(1) serves as the basis for dispositional orders that are also challenged on appeal [citation]; (2) could be prejudicial to the appellant or [(3)] could potentially impact the current or future dependency proceedings [citation]." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762 (*Drake M.*).) Even where, as here, the appellant was a noncustodial parent at the time of DCFS's intervention, the jurisdictional finding is ordinarily reviewed due to its potential negative impact on any future request for custody under section 361.2. (*In re Christopher M.* (2014) 228 Cal.App.4th 1310, 1317.)

the minor is a person described by section 300 must be made under the preponderance of the evidence standard. (§ 355, subd. (a).) On appeal, "'we must uphold the court's [jurisdictional] findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings.'" (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022, quoting *In re Monique T.* (1992) 2 Cal.App.4th 1372, 1378.)

The juvenile court found jurisdiction appropriate under section 300, subdivision (b). As pertinent here, subdivision (b) permits the court to adjudge a child a dependent of the juvenile court where "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's . . . substance abuse." A true finding under subdivision (b) requires proof of: "(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the minor, or a 'substantial risk' of such harm or illness . . . ." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) Where, as here, there is no evidence the child has suffered serious physical harm or neglect of any type, the agency is required to show that the child is at substantial risk of suffering serious physical harm

caused by the offending parent's failure to protect or care for the child. (*In re Jonathan B.* (2015) 235 Cal.App.4th 115, 119.) The basic question to be addressed is "whether circumstances at the time of the hearing subject the minor to the defined risk of harm." (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1134; accord, *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396 ["The third element [of a true finding under subdivision (b)] . . . effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future"].)

Father contends there was insufficient evidence of his recent marijuana use to support jurisdiction. We disagree. Mother's statement that he used marijuana "often," and his November 2015 statement that he obtained his marijuana card under false pretenses but was not going to use it "anymore" were evidence of recent use. The court could reasonably infer from that evidence, and the numerous missed or diluted tests that Father was a chronic user of marijuana (see *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1343 [drug test missed without excuse may be considered dirty]; *In re Christopher R., supra,* 225 Cal.App.4th at p. 1217 [same]; *In re Natalie A.* (2015) 243 Cal.App.4th 178, 186 [dilute urine sample is "effectively inconclusive"]), and that as of the time of the hearing he was unable to refrain from using the drug, despite knowing that positive and missed tests would negatively affect his ability to reunite with A.

Father further contends substantial evidence does not support a finding that A. suffered or will suffer serious physical harm as a result of his marijuana use. He cites *Drake M.*, *supra*, 211 Cal.App.4th 754, which held that "the mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found," and that a jurisdictional finding must be supported by evidence of "a current substance abuse problem . . . ." (*Id.* at pp. 764, 766.) The court defined proof of a substance abuse problem to include "'recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home'"; "'recurrent substance-related legal problems'"; and "'continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance . . . .'" (*Id.* at p. 766.) Father's behavior met the *Drake M.* test. He had been involved in two domestic altercations that led to the involvement of law enforcement and, according to family members, "multiple" others. He had been in and out of jail since December 2014 because he repeatedly missed scheduled court dates and because he was unable to comply with the simple requirement to enroll in a domestic violence program. He was incarcerated at the time of the hearing and when not incarcerated, lived with a parent, having no visible means of support. He was unable to assume the care and custody of A. when asked to do so by Mother's relatives, despite being informed that Mother was using methamphetamine and exposing A. to other substantial

dangers in her home. The record amply supports the court's conclusion that Father was a habitual user of marijuana and that such use rendered him unable to care for his very young child. (See *In re Natalie A.*, *supra*, 243 Cal.App.4th at pp. 183, 185, 186 [juvenile court's finding that father who used marijuana was a "substance abuser" within the meaning of *Drake M.* was supported by evidence that he was unemployed, had no permanent home, and had multiple drug-related criminal problems].) Moreover, even were we not convinced substantial evidence supports the court's jurisdictional finding in this regard, the alternative ground for jurisdiction relating to Father was amply supported by the evidence.

Father contends the December 2014 domestic violence incident does not support the jurisdictional finding. He asserts that the passage of time since the incident and the evidence that he and Mother had no plans to reunite showed there was no current risk of harm to A. As numerous courts have held, exposing children to domestic violence can support a finding of detriment sufficient to support a jurisdictional finding. (See, e.g., *In re T.V.* (2013) 217 Cal.App.4th 126, 134; *In re R.C.* (2012) 210 Cal.App.4th 930, 941; *In re E.B.* (2010) 184 Cal.App.4th 568, 576; *In re S.O.* (2002) 103 Cal.App.4th 453, 460-461; *In re Heather A.* (1996) 52 Cal.App.4th 183, 194.) Domestic violence in the household represents a failure to protect the children from the substantial risk of encountering such violence and suffering serious physical harm while it is occurring. (*In re*

Heather A., *supra*, at p. 194.) Moreover, "'children of these relationships appear more likely to experience physical harm from both parents than children of relationships without . . . abuse. . . . [E]ven if they are not physically harmed, children suffer enormously from simply witnessing the violence between their parents . . . [¶] [And] children of [a parent who abuses the other parent] are likely to be physically abused themselves.'" (*In re E.B.*, *supra*, at p. 576; accord, *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 562.)

Father's assault on Mother in December 2014 was extremely violent. It occurred in the presence of a young child. In addition, it involved the use of a dangerous weapon and an attack on a third party who tried to intervene. It was not the first altercation between the parties; it followed the August 2014 incident by mere months. Nor was it the last, as relatives reported another incident in September 2015, and said that the couple had been involved in "multiple" domestic altercations. Father was ordered to participate in a domestic violence program following the December 2014 assault, but failed even to enroll. Although he claimed he and Mother were no longer together, he reportedly was responsible for her most recent pregnancy. Moreover, as the court noted, Father and Mother will be forced to interact in the future in dealing with A. His failure to obtain treatment to resolve his propensity for domestic violence supports the court's alternative jurisdictional finding.

B. *Disposition*

Father contends that if the jurisdictional findings relating to him are reversed, the dispositional order also must be reversed. As discussed, we find no basis for reversing the court's jurisdictional findings.

Father further contends the court erred when it removed A. from him under section 361(c) because the boy was not residing with him at the time of either hearing. It has been repeatedly held that a juvenile court may not "remove" a child from a parent's physical custody under that statutory provision unless the child was residing with that parent when the petition was initiated. (*In re Julien H.* (2016) 3 Cal.App.5th 1084 (*Julien H.*); *In re Dakota J.* (2015) 242 Cal.App.4th 619, 632; *In re Abram L.* (2013) 219 Cal.App.4th 452, 460; *In re V.F.* (2007) 157 Cal.App.4th 962, 969.) However, the court's reference to removal from Father at the disposition hearing had no practical effect on the proceeding, and provides no basis for reversal for the reasons explained in *Julien H.*[15] There, the father challenged the order limiting access to his child to monitored visitation, contending removal under section 361, subdivision (c) was inappropriate and "no other authority grants the court the

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[15] To the extent Father challenges the court's order at the detention hearing "removing" A. from his custody, the challenge is moot; that order was superseded by the dispositional order and no effective relief can be provided. (See *Julien H.*, *supra*, 3 Cal.App.5th at p. 1088, fn. 7.)

power to limit his access to his child in [an analogous] manner . . . ." (3 Cal.App.5th at pp. 1089-1090.) The court disagreed: "[T]he dependency court has the power under section 361, subdivision (a) and section 362, subdivision (a) to limit the access of a parent with whom the child does not reside and thus effectively remove the child from the noncustodial parent."[16] (*Julien H., supra*, at p. 1090.) Because the father "d[id] not argue that in order to justify exercise of its power under section 361, subdivision (a) and section 362, subdivision (a), the dependency court must make a different factual finding or apply a higher standard of proof than would be required under section 361, subdivision (c)," he failed to show that the court's reliance on section 361, subdivision (c) was prejudicial. (*Julien H.*, at p. 1090.) Here, Father challenges the court's use of the word "removal" and citation to section 361, subdivision (c), but does not contend the court had no authority to limit access to his son. Nor does he suggest the court was required to make a different factual finding or apply a higher standard of proof

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[16] Section 361, subdivision (a)(1) grants the court authority to "limit the control to be excised over the dependent child by any parent or guardian," and applies to "any parent or guardian . . . ." Section 362, subdivision (a) authorizes the court to "make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child," once he or she is "adjudged a dependent child of the court . . . ."

than the one required under section 361, subdivision (c). Accordingly, he has shown no prejudice and any error in proceeding under section 361, subdivision (c) was harmless.

DISPOSITION

The court's jurisdictional and dispositional orders are affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.